Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Methods to Target and Eliminate Unlawful Robocalls	)	CG Docket No. 17-59
	)	

COMMENTS OF VIBES MEDIA, LLC

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Vibes Media, LLC ("Vibes") hereby comments on the Federal Communications Commission's ("FCC" or "Commission") Second Further Notice of Proposed Rulemaking ("FNPRM") regarding proposals to create a database to provide reassigned number information.[1] Vibes supports the Commission's efforts to establish a mechanism that enables companies engaged in marketing to consumers (referred to herein as "callers" or "marketers") to identify accurately when phone numbers of consumers who consented to receive marketing communications are reassigned to a new consumer. Targeted action is needed regarding reassigned numbers in order to allow mobile marketers to meet regulatory obligations, provide consumer satisfaction, and avoid unnecessary litigation.

I. INTRODUCTION AND EXECUTIVE SUMMARY

Founded in 1998, Vibes is a mobile marketing technology leader that helps some of the world's biggest brands acquire, engage, and deepen relationships with an interested and engaged consumer base. Vibes' mobile solutions include mapping out a mobile strategy, building permission-based mobile databases, driving sales with mobile coupons, activating sponsorships,

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[1] *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, FCC No. 18-31, CG Docket No. 17-59 (rel. Mar. 23, 2018) ("FNPRM").

and integrating with companies to forge immediate, long-lasting, and mutually beneficial customer relationships.

As Vibes explained in its initial comments responding to the FCC's Second Notice of Inquiry,[2] Vibes has agreements with almost every wireless carrier operating in the United States that allow Vibes to connect directly (in the case of the large wireless carriers) or indirectly via carrier consortiums (in the case of smaller wireless carriers) in order to deliver messages to consumers via short codes. Vibes works directly with clients that seek to market via text messages to their consumers and with data aggregators that leverage Vibes' carrier connections. Vibes works closely with mobile governing bodies, such as the Mobile Marketing Association and CTIA-The Wireless Association ("CTIA"), to ensure that all of its messaging is compliant and adheres to industry rules, regulations, and best practices.

In the absence of a comprehensive regulatory-mandated solution in place to help callers identify and remove reassigned numbers, the industry has developed a fairly successful workaround that many responsible industry actors, including Vibes, use. As Vibes explained in prior comments, implementing minor modifications to the existing process would immediately create an efficient and effective solution to enable mobile marketers to remove reassigned numbers from their databases. It would also achieve the Commission's goal of "reducing unwanted calls intended for another consumer while helping callers avoid the costs of calling the wrong consumer, including potential violations of the [TCPA]."[3] Accordingly, the Commission should issue rules now that target relatively minor modifications to this industry-designed

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[2] Comments of Vibes Media, LLC at 2, CG Docket No. 17-59 (filed Aug. 29, 2017) ("Vibes Comments") (attached hereto).

[3] FNPRM at ¶ 2.

workaround. These modifications can be in lieu of creating the proposed reassigned numbers database, or in advance of adopting final rules that create such a database.

The FCC should implement the following modifications, which would immediately and significantly reduce the risk of consumers with reassigned numbers receiving unwanted communications:

(1) Require carriers to add disconnected numbers to a disconnection file;

(2) Require carriers to provide marketers with an updated disconnection file at a standard frequency that gives marketers enough time to scrub numbers from their databases before a number is reassigned;

(3) Require carriers to prepare their disconnection files using a standardized format;

(4) Require the disconnection files to indicate which numbers have been ported to another carrier, and to which carrier the number has been ported;

(5) Require adequate transparency of the disconnection data to enable marketers to validate the data they receive; and

(6) Prohibit carriers from charging additional fees or assess other compensation for reporting disconnected number information.

In the alternative to establishing rules now, the FCC can encourage the industry to develop standard practices that the Commission can later adopt into rules, so long as it requires everyone to adhere to the industry-developed guidelines. Should the FCC proceed down the path of developing a reassigned number database, it must ensure that the database itself and the process for obtaining the information conforms to industry requirements.

If, instead, the Commission proceeds to establish a reassigned numbers database (either now or after it adopts these targeted modifications), the database must function as a single validation point for companies like Vibes to obtain data regarding reassigned numbers, and must either push the data out or enable providers like Vibes to pull the data from the database. Critically, the database should not be set up as a "queriable" database such that the marketer has

to check each number it calls against a data source for validation prior to each time it sends an individual message.

Importantly, the Commission should grant a safe harbor to callers that utilize the FCC-developed solution. This can be an interim solution while the Commission decides how to interpret the language "called party" in light of the ruling in *ACA International*, or a permanent solution should the FCC determine that reasonable reliance on consent requires marketers to utilize the database.

II. THE COMMISSION SHOULD ADOPT TARGETED CHANGES TO THE EXISTING INDUSTRY-DEVELOPED SOLUTION PENDING THE CREATION OF THE DATABASE

A. Overview of The Existing Industry-Developed Solution

For many years, carriers have made disconnection lists available to mobile marketers in order to allow responsible mobile marketers to avoid sending messages to reassigned numbers. Motivated by customer satisfaction, Vibes developed its own internal system to scrub numbers contained on carriers' disconnection lists from its databases. Vibes did so many years before the Commission's decision to impose liability under the TCPA in the reassigned number context because Vibes and Vibes' clients (*i.e.*, the brands that deliver messages to consumers) did not want to deliver marketing messages to the wrong consumers. Implementing such a system was particularly important to reputable and TCPA-complaint actors like Vibes, and the clients that utilize Vibes' services to market to their own customers and wanted to be distinguished from the bad actors in the industry.

Importantly, the industry-developed solution does not actually identify when a number has been reassigned (*i.e.*, it does not provide notification when a number assigned to one customer is returned to the carrier's or the industry-wide numbering pool and then assigned to

another customer). Instead, the solution is more accurately described as a disconnection notification. That is, it identifies numbers that have been disconnected for any reason. This distinction is important because it results in the removal of numbers from marketing programs that have been disconnected for reasons other than reassignment. For instance, the disconnection files that Vibes receives from carriers include numbers that have been disconnected for a wide variety of reasons, including a permanent service cancellation, a temporary service suspension, including for non-payment, and a disconnection for purposes of a consumer that has asked to port its number from one carrier to a new carrier.

Each carrier, and each consortium of carriers in the case of smaller carriers, employs a different process for notifying Vibes of numbers that have disconnected from that carrier's network. Most carriers and carrier consortiums produce and release daily disconnection files. Some carriers push a file containing this list directly to Vibes, while others require Vibes to pull a file from an external location. No two files are formatted the same. In terms of the time lag between when a number is disconnected and when that number appears in the file, two of the major carriers typically add disconnected numbers to their disconnection lists on the same day the disconnection is performed, and one of the major carriers adds disconnected numbers to its disconnection list three days after the disconnection. Most other carriers add disconnected numbers to the list on the day following the disconnection.

Vibes standardizes and combines the files in order to create its own daily internal disconnection file. Vibes refers to this file as its "deactivation file." Vibes runs this deactivation file daily against all of its subscriber databases. If a number on the deactivation file appears in one of Vibes' subscriber databases, Vibes removes the number from the database and records that it has been removed due to a disconnect.

From Vibes' perspective, there are several resolvable problems with the current industry solution. Most importantly, the files are under-inclusive in that they can miss numbers. This likely is caused by technical or administrative errors that are inherent in creating large lists from complex databases with great frequency. Vibes has no way to detect that a number is missing from a disconnection list at the time Vibes receives it—or typically any time before inadvertently sending a message to a consumer who was issued a reassigned number.

In addition to being under-inclusive (*i.e.*, missing reassigned numbers in some instances), the files also are over-inclusive. As Vibes explained above, the files that it receives from carriers do not distinguish between numbers that have been disconnected due to reassignment and numbers that have been disconnected for other reasons, such as when a consumer is just porting her number to a new carrier. Vibes has no insight into port requests, so it must remove all numbers in the file to ensure that it removes every number that has been reassigned.[4]

There is also a timing issue in the current industry solution. In Vibes' experience, there could be up to a 24 hour lag, depending on when a carrier posts its disconnection files and when Vibes pulls it in order to scrub its database, because the carriers currently provide the disconnection files only once per day. This can create a greater delay because there is no standardization in when carriers release updated files, which means carriers could provide an

[4] In order to continue receiving messages, erroneously unsubscribed consumers have to re-subscribe to the message lists that they have already given their express consent to join. And, more often than not, the consumer does not realize he or she needs to opt back in and will miss valuable messages (from both the consumer and company perspective). This leads to consumer frustration and increased costs to businesses that utilize mobile marketing solutions.

updated file very shortly after Vibes has checked for an update, so Vibes will not receive it until the following day.[5]

B. The FCC Should Immediately Enact Several Minor Modifications to The Industry-Developed Solution to Improve Accuracy and Effectiveness

In order to improve the usefulness and accuracy of the carrier lists provided as part of the industry-developed solution, Vibes suggests several relatively simple modifications.

First, the Commission should require carriers to add disconnected numbers to their disconnection files, as has long been the practice. It is not currently a requirement, but mandating the practice will help to ensure that carriers are participating.

Second, the carriers should provide marketers with updated files at a standard frequency that gives marketers enough time to scrub numbers from their databases before a number is reassigned. However, reporting only when a number has been reassigned to a new customer does not give marketers sufficient time to scrub the number from their databases. Therefore, Vibes proposes that the trigger for reporting should be when the carrier permanently disconnects a number from the current subscriber. Ideally, Vibes would receive notice that the number is permanently disconnected within 24 hours of the number being disconnected from the current subscriber.

Third, carriers should be required to use a standard format to prepare their disconnection files. Vibes receives these files in various forms today and can adapt its system and processes to any format, so long as the format is consistent across all carriers.

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[5] This does not ordinarily create any litigation risk because of the aging and reassigned number process, but Vibes potentially faces liability if a carrier recycles its own numbers more quickly than anticipated.

Fourth, the FCC should require carriers to indicate when a number has been disconnected for the purpose of a subscriber porting the number from one carrier to a new carrier. This would enable marketers to continue to send communications that the consumer signed up for, even after they port their numbers. Simply having carriers scrub their disconnection files of ported numbers would not achieve the same result because Vibes also must know which carrier provides service to a given number in order to continue sending a text message to that number. Without knowing to which carrier a number has been ported, Vibes would continue sending messages to that number through its connection to the wrong carrier. These messages would fail because the number and the new carrier code would not match.

Fifth, there should be enough transparency in the process to enable marketers to validate the disconnection files. Specifically, controls should be built into the data that enable recipients of the lists, such as Vibes, to confirm proper data generation and number inclusion, including that the entire file was generated, downloaded, and loaded successfully. Inclusion of row counts, last update timestamps per carrier, or other common techniques in data migration would facilitate validation.

Last, the FCC should not allow carriers to charge additional fees or assess other compensation for reporting disconnected number information. Most carriers already charge a messaging fee to aggregators for each message that they deliver. The messaging fees include the cost of delivering the message, as well as administration costs. Vibes, therefore, already pays the carrier for generating the disconnected number information in the form of the messaging fees it pays to the carriers.

C. The FCC Can Encourage Industry to Establish Guidelines Collaboratively

It is essential for the FCC to establish that carriers must consistently provide lists of disconnected numbers (that also indicate numbers that have been ported and to which carrier) on a standard timetable and in a standard format, and ensure there is a way to validate the lists. The FCC can do this by adopting regulations, or by simply requiring carriers to adhere to the industry-developed solutions.

The telemarketing ecosystem has successfully engaged in this type of standards-setting in the past. For example, CTIA convened wireless messaging ecosystem stakeholders to develop and continually update its widely used Messaging Principles and Best Practices.[6] Companies that abide by these principles are able to provide consumers with relevant mobile communications while honoring consumer privacy and choice. In many contexts, the FCC has encouraged industry to develop standard practices collaboratively rather than having the Commission engage in top-down decision-making that reaches deep into industry operations.[7]

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[6] CTIA, *Messaging Principles and Best Practices* (Jan. 19, 2017), https://www.ctia.org/docs/default-source/default-document-library/170119-ctia-messaging-principles-and-best-practices.pdf.

[7] *See Amendment of the Commission's Rules to Establish a Single AM Radio Stereophonic Transmitting Equipment Standard*, Report and Order, 8 FCC Rcd. 8216 (1994) (industry and other interested stakeholders collaborating to develop the Motorola C-Quam system for transmission of stereophonic AM broadcast radio service, which the Commission later incorporated into its rules); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd. 17771 (1996) (industry and other interested stakeholders collaborating to develop the ATSC 1.0 standard for digital television transmission). In a slightly different model, the National Telecommunications and Information Administration of the Department of Commerce has convened a number of multi-stakeholder processes, where participants develop industry standards, publicly commit to following those standards, and are subject to Federal Trade Commission enforcement in the event the participants fail to live up to their commitments. *See* NTIA, *Multistakeholder Process: Unmanned Aircraft Systems* (June 21, 2016), https://www.ntia.doc.gov/other-publication/2016/multistakeholder-process-unmanned-aircraft-systems.

Recently, in a similar context, the Industry Robocall Strike Force formed in response to the Commission's call for the industry to "develop an action plan for providing consumers with robust robocall-blocking solutions."[8]

Here, the Commission could take a similar approach. It could ask the industry to develop standards that meet the six requirements described above that the Commission can later adopt into rules, or it could adopt a rule authorizing the industry to adopt and commit to follow self-regulatory guidelines that meet the six requirements described above.

III. INFORMATION NEEDED FROM A REASSIGNED NUMBERS DATABASE

Should the Commission proceed with establishing a reassigned numbers database either now or after it adopts the targeted modifications described herein, Vibes agrees that it should contain comprehensive and timely information. In order for the database to be functional for marketing providers like Vibes, the information in the database must be pushed to the marketer, or the marketer must be able to pull the data. Importantly, the process cannot be such that the marketer has to check each number it calls against a data source for validation prior to each time it sends an individual message.

There are several types of information that the database must make available to callers. Before it can adopt these details, however, the Commission must clarify certain terms that are used but not defined throughout the FNPRM, such as "reassigned numbers," and then indicate when such numbers must be reported and how. The database must enable the marketer to know when a phone number is no longer associated with a particular consumer, such as when it becomes available to assign to a new subscriber (*i.e.*, when the number is returned to the carrier's

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[8] *Robocall Strike Force Report* at 2 (Oct. 26, 2016), https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf.

own or the industry-wide numbering pool) and the date that this occurred. And the caller must know if the subscriber ported its number to a new carrier and ideally to which carrier the number was ported.

Finally, the database must function as a single validation point for companies like Vibes to obtain data regarding reassigned numbers. For Vibes' services, this means that data must come from all carriers that provide consumer text messaging services. The data must be provided on a timely basis and in a format that enables Vibes to scrub its database of numbers before a message can be inadvertently sent to a subscriber of the newly reassigned number. There should be no cost to the database, as Vibes already pays carriers a per message fee that includes the cost of messaging as well as administrative costs, including the costs associated with the existing industry-developed solution.

A. The Database Should Produce Lists That Marketers Can Pull Down, Rather Than Operate as a Queriable Database

The key to establishing an effective and efficient database is ensuring that it provides the information a marketer needs to facilitate the removal of reassigned numbers. However, the text of the FNPRM appears to assume that the caller would use the database like a look up service by sending numbers from its own database to the newly established reassigned number database (*i.e.*, a "queriable database").[9] This is the opposite of the reassigned number process in place today and, if adopted, would introduce substantial barriers to utilizing the database.

In a queriable database model, either Vibes would need to check every number before sending a message to that number, or Vibes would have to send its lists to the database administrator and wait for the list to be returned. The first scenario is performance and cost

[9] FNRPM ¶¶ 12, 13.

prohibitive to Vibes, and the cost to build a queriable system that can handle the needs of the industry will be expensive. The second scenario—sending a list of subscribers to the database administrator and waiting to get data back—also introduces a timing concern. Vibes' subscriber base is in constant flux as a result of new subscriber opt-in requests and subscribers submitting opt-out requests. Thus, there would be a timing gap between submitting the list and the results returned. Second, the process would require providers like Vibes to send its data to an outside site, which introduces privacy and security-related concerns.

The queriable process also assumes that users accessing the database have only a single list of numbers that they can use to query the database. In reality, however, users are likely to have numerous lists of numbers. For example, Vibes manages approximately 1500 databases for its clients. A queriable database would require the caller to input each list individually or to somehow aggregate its lists for purposes of querying the database and then disaggregating the lists back to the original form. This process would create delay and expense, and would increase the possibility of introducing errors in the data collection process. Further, the necessity of querying each phone number individually prior to sending each message would likely not operate at the needed speeds, given the millions of messages sent each day at speeds of thousands of messages per second.

Rather than operating like a look up source, the database should enable the database users to pull the data or, alternatively, the database should be able to push the data to users of the database. This process should enable the user of the database to receive or to pull the data into its own systems so that it can scrub numbers from its lists or, as described below, update its database to reflect the new carrier information in the case of a ported number.

B. The Database Should Inform Callers When a Number Has Been Permanently Disconnected or Ported by a Subscriber to a New Carrier

The database should produce a file that contains two sets of numbers: (1) numbers that have been disconnected and are now available for assignment to a new subscriber either because the carrier has returned them to the carrier-managed numbering pool or because the carrier has returned the number to the numbering administrator that maintains the industry-wide numbering pool; and (2) numbers that have been disconnected so that the subscriber of the existing number can port the number to a new carrier.

In order to establish which numbers and during which part of the numbering process a number must be reported, the Commission should clarify several terms it uses throughout the FNPRM that are not clearly defined in the context of the uses of the terms in the FNPRM. First, a "reassigned number" should mean a phone number that was previously associated with a subscriber of a carrier that has been assigned to a new subscriber. Reassigned numbers can be reassigned between subscribers of the same carrier, or transferred to a new subscriber of a new carrier. Second, a "deactivated number" should mean a number that is no long being used by the current subscriber for reasons such as phone or account suspension. A deactivation may not be permanent, such as in the case of a subscriber that pays a late invoice and has its phone reactivated and, therefore, such numbers are distinct from reassigned or disconnected numbers. Third, the FNPRM defines a "disconnected number" as "disconnected when it is no longer used to route calls to the disconnecting subscriber of record."[10] A "disconnected number" should mean a number that is permanently disconnected from the current subscriber. These numbers

[10] FNPRM ¶ 3, n. 2.

remain disconnected for a period of time before they are made available for reassignment to a new subscriber.

These distinctions are important for carriers submitting information to the database as well as users of the database, such as Vibes and other mobile marketing providers. Vibes generally agrees with the view that it is better to know earlier in the process that a subscriber is no longer associated with the number. However, the FNPRM appears to assume that the trigger for alerting users to a number is when the number becomes reassigned, which may not give callers enough time to scrub the number from its lists. Instead, the database should inform users when a number has been disconnected, *i.e.*, when a phone number is no longer associated with the most current subscriber on a permanent basis. Alerting callers to the number prior to this point (*e.g.*, deactivation) is premature because it can yield a false positive, such as when a prepaid plan runs out of funds, causing the number to become temporarily disconnected.

If the database were to inform users whenever a number has been disconnected or deactivated for any reason, then it should also contain data to inform users of the type of disconnection that has occurred. As explained above, this distinction is important because including deactivated (or temporarily disconnected) numbers in the list will result in the removal of numbers that have been disconnected for reasons other than permanent disconnection or reassignment. For instance, the disconnection files that Vibes currently receives include, without distinction, numbers that have been permanently disconnected and may eventually be reassigned, numbers that have been deactivated or temporarily disconnected due to service cancellation or lack of funds for prepaid phones, and numbers that have been disconnected by one carrier so that the consumer can port the number to a new carrier.

In addition, the data should also indicate whether the disconnection was due to a porting request, meaning the current subscriber of the number has asked to move the number to a new carrier. If the database contains this information, then it should also contain the carrier to which the number is being ported. Messaging via short code requires the sending party to have the correct carrier code in order to send messages to the subscriber on the carrier network. In other words, without both the indication of the port and the new carrier, the subscriber will no longer receive the messages he or she requested. However, if the database contained the port data, this would enable the subscriber to continue to receive the requested information.

The FNPRM also asks what information a legitimate user of the database can be expected to possess about the subscriber.[11] Database users will have very limited information regarding subscribers. The information in a marketer's possession often is limited to the subscriber's number and a valid "as of" date based on the last successful message sent to the subscriber's number. The subscriber's name often is not known, and it is not necessary for the types of marketing messages to which most consumers subscribe. In addition, even if a subscriber's name is in the marketer's possession, it may not yield an exact match against the carrier-provided files due to use of initials, nicknames, or incomplete name information. Thus, names would be difficult to use as criteria for matching or validating data. Moreover, the Commission can limit concerns regarding consumer privacy by excluding information such as the subscriber names.

C. The Database Must Act as a Single Validation Point for Users

The database must contain enough information to operate as a single validation point for database users, and the data must be made available to users of the database in a timely manner. In order to be effective and function as a single validation point, the database should include any

[11] FNPRM ¶ 12.

text-enabled number that has been permanently disconnected (meaning it will be available for reassignment or has been reassigned) or disconnected pursuant to a porting requests as described above. There is not a strong need for the database to provide temporary and/or other account suspensions, and in fact it may just increase the size of the file to be processed.

The databases should also include the date the number is disconnected so that the database user can validate whether the change in status predates the opt-in that the caller has on record.[12] If it predates the opt-in, then the marketer will know the request is from a new subscriber (*i.e.*, the subscriber to whom a number was reassigned) and it need not remove the number from its lists. If the disconnection data post-dates the opt-in, then the marketer will know that it should remove the number from its lists.

If a number has been disconnected pursuant to a porting request, the databases should include the name or code of the carrier to which the number is being ported. The database should also include any alias numbers associated with the disconnected number. For instance, wireless resellers may have two numbers associated with one subscriber, and mobile marketing providers need to know that both numbers are disconnected in order to ensure that neither number remains in any database.

The FNPRM asks whether the database should contain all numbers allocated by a numbering administrator or a subset of numbers.[13] The database should contain a list of numbers that have changed on some interval, such as a daily file or a weekly file of changes during the past week, and a list of all numbers that have entered the database at some point so that a caller

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[12] The opt-in record refers to the consent to receive marketing calls or messages that the subscriber provides to the caller.

[13] FNPRM ¶ 20.

can query to get the current status of a number. Making multiple slices of the data available will enable users to process data based on their needs.

Users of the database must know how long the database will retain information regarding a particular change of status for a number in order to develop internal operational processes. For example, in the queriable database format, a number may be marked permanently disconnected on a Monday, but a message is not sent for two weeks. When the company prepares to send the message, it will look up the number in the database to ensure it is still active. If the list of disconnected numbers is only maintained for a few days, or a week, the company may not become aware of the disconnection prior to sending another message. If the company receives the information nightly (either pushed to the company by the database or pulled by the company), then it likely does not need to have the full history available. However, enabling users to access the full history will provide other benefits. For instance, Vibes' clients may transfer lists to Vibes from other mobile marketing providers or from an internal database. As part of onboarding new numbers, the full history will enable the company to validate the compliance of the list, even with numbers that may have been in a database for the several years. This adds an extra layer of protection for consumers.

Moreover, establishing a minimum aging period before making disconnected numbers available for reassignment would help to ensure that all parties have adequate time to process the information and reduce risk of inadvertently messaging new consumers. At a minimum, the aging time must be greater than the time for a carrier to send the information to the database, plus the time required for database to make information available, plus the time for the caller to retrieve, process, and remove numbers.

The database information should be retained and made available in standardized file formats that can be easily processed. Given the relatively simple nature of the data and the potential large data sizes, formats with large signal to noise ratios (CSV, TAB) should be used over low signal to noise ratio formats (XML, JSON, etc). CSV/Tab type files are also able to be easily split to operate in parallel with the processing effort, as compared to XML/JSON, et al. formats, which are not. It would not be difficult to produce the files in multiple formats to best meet the needs of a diverse user set.

IV. A SINGLE DATABASE APPROACH MIGHT BE A WORKABLE SOLUTION IF PROPERLY CRAFTED

Although Vibes believes that the FCC can achieve its goals efficiently and effectively by modifying the existing industry-developed solution rather than developing a new database process, the administration of a single database may be a workable solution if the FCC: (1) establishes clear rules pertaining to who can access the database and under what circumstances, (2) requires all carriers to provide information to the database, and (3) limit the costs imposed on callers for usage and administration of the database.

A. User Access to Database Information Should Be Limited to Marketers That Certify to Privacy, Security, and Use Needs, And Users Should Not Incur Additional Fees

Companies that engage in mobile marketing, including mobile marketing providers such as Vibes, must have access to the database. Importantly, enabling the marketing provider to access the database directly will be more efficient. Once Vibes becomes aware that a number should no longer be messaged, it can simultaneously remove that number across all of its databases for all of its clients. However, Vibes agrees that it is reasonable to require marketing providers like Vibes to certify prior to being granted user access to database information that they meet certain privacy and security criteria, as well as to certify a need for the information.

The purpose for which a user obtains information in the database should align with the intent of this information. In other words, the provider seeking this information should clarify that it is using it to prevent inadvertently messaging a number that has been reassigned.[14]

B. The FCC Must Require All Carriers to Submit the Required Information to the Database

Any party that assigns a phone number to a subscriber should be required to submit the required information to the database, if contacting that subscriber would trigger a TCPA obligation. There is no need to craft exemptions, which would leave callers vulnerable. For instance, subscribers of carriers exempt from the reporting obligations can still provide consent to receive messages/calls, but if the subscriber disconnects their number, there is no way for the caller to determine that. Importantly, smaller, rural carriers serve around 2 to 3 million subscribers, so exempting such providers would impact a large number of people.[15]

C. The FCC Should Not Assess Fees on Callers for Usage or Administration of the Database

The FCC should not allow carriers to charge additional fees or assess other costs for reporting disconnected number information. Likewise, the FCC should not charge companies a fee to access the database. Vibes pays a fee to carriers for each message that it sends over that carrier's network. The per message fee paid to the carriers includes the cost of delivering the message, as well as administration costs. Vibes, therefore, already pays the carrier for generating the disconnected number information in the form of the messaging fees it pays to the carriers.

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[14] As long as the database is available to parties that can certify that the privacy, security, and use needs are met, there should not be any reason to allow companies to resell the information in the database for profit, or to append it to "big data" information.

[15] *List of United States Wireless Communications Service Providers*, WIKIPEDIA (June 6, 2018), https://en.wikipedia.org/wiki/List_of_United_States_wireless_communications_service_providers

In any event, the fees for access to the database should be no more than the fees charged to access the Do Not Call database. Based on the differences between the structures of the two databases, it is reasonable to assess fees for the proposed database that are significantly less than the fees associated with the Do Not Call registry. For one, there are many access points to the Do Not Call registry. For instance, a subscriber can add its name to the Do Not Call registry by calling a toll free number or by signing up online. The Do Not Call registry then must collect the data from various sources and combine the data into a database, which adds complexities and expenses to the process. On the other hand, consumers do not interact with the registry in any way. The parties that do contribute data to the proposed database—*i.e.*, the carriers—will have no or nominal expenses associated with uploaded data to the proposed database. This is because carriers already maintain this information today for internal numbering purposes as well as for creating the lists that carriers currently provide in the industry-developed solution. Accordingly, the carriers should not incur any additional expense for the database administration. In turn, the FCC should not allow carriers to assess additional fees on callers.

Moreover, the cost of the administration of the database should not fall on users of the database or, at a minimum, should be evenly shared between users and carriers. The expense of the existing industry solution already is shouldered in the messaging fees that marketers using short codes pay to carriers. To the extent that the database administrator replaces burdens that currently fall on the carrier, that reduces carrier costs and should, in turn, reduce the per messaging fees paid to the carriers.

D. Mandatory Reporting to Commercial Data Aggregators Poses Concerns

The FNPRM proposes an alternative to the single database approach that would require service providers to report the disconnected number data to commercial data aggregators.[16] To the extent that mobile marketing providers such as Vibes are considered "Commercial Data Aggregators," this approach is somewhat similar to the existing industry-developed solution. But, if the intent is to create an additional third party to whom Vibes would go to obtain the data, then the proposed approach raises concerns.

Today, as described above, Vibes has contractual agreements with carriers and carrier consortia to deliver messaging via short code over the carrier networks. Some of the agreements mandate that Vibes utilize the files of disconnected numbers that those carriers make available to Vibes. If the Commission required carriers to submit data to Vibes that conforms to the criteria outlined here as modifications (*e.g.*, timing, frequency, format) to the existing solution, then Vibes and the service providers could modify existing agreements to conform to the new regulations. The fee for such data is already included in the per messaging fees under these contracts, so no additional fee arrangements would be needed.[17]

Creating a new category consisting of third party Commercial Data Aggregators that would compile this information from carriers would create unneeded cost, expense, and complexity. In addition, unless every Commercial Data Aggregator has a relationship with every carrier, then mobile marketing platform providers would have to enter into agreements with enough data aggregators to obtain the required data from all carriers. The FCC would also have

[16] FNRPM ¶ 46.

[17] FNRPM ¶ 47.

to require Commercial Data Aggregators to make all information available to all parties on an equal basis.

Vibes believes there should be a high bar to qualify to become a Commercial Data Aggregator given the performance and processing needs of the services, as well as the data and security expertise required. These standards must be high enough to keep out bad actors, but should support multiple aggregators to enable competition.

V. THE COMMISSION SHOULD GRANT CALLERS THAT UTILIZE THE DATABASE A TCPA COMPLIANCE SAFE HARBOR

Establishing requirements for the reporting of numbers is a great step toward resolving the reassigned number challenge, and will provide the means for legitimate mobile marketers to meet consumer demand. However, even with the improvements to the current process or the creation of a centralized database that the Commission plans to develop in this proceeding, technical and administrative errors will inevitably cause some reassigned numbers to be left off the lists of numbers to be scrubbed. Companies that use the solution adopted (or endorsed) by the FCC should not face liability for such errors. Where (1) a caller uses an FCC established or endorsed process to identify reassigned numbers and remove them from its databases, and (2) the caller uses autodialing technology or a pre-recorded voice to contact a recipient who did not previously provide consent solely as a result of an undiscovered number reassignment, the caller should be deemed to have complied with the FCC's TCPA regulations that could potentially be read to make such contact a violation of the TCPA.

Responsible mobile marketing platform providers, like Vibes, and the brands that use these platforms, take great pains to comply with TCPA regulations. Vibes has a vigorous TCPA compliance program, which includes technical safeguards, employee training, and monitoring.

Vibes invests significant time and effort to ensure that its clients' messages reach the correct consumer, including by attempting to identify reassigned numbers.

Nevertheless, responsible companies still face numerous TCPA lawsuits, many in the form of class actions. Indeed, as Chairman Pai recognized in 2015, the high statutory penalties associated with the TCPA have not "incentivize[d] plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters," who tend to lack deep pockets or, in many cases, are entirely judgment-proof.[18] Instead, "trial lawyers have found legitimate, domestic businesses a much more profitable target."[19] These types of lawsuits against legitimate American companies are why the TCPA has become "the poster child for lawsuit abuse."[20] Many of these lawsuits are frivolous, involving consumers that "misremember" consenting to receiving calls or messages, or manufactured evidence.[21] In short, few lawsuits against legitimate American businesses that employ best practices are a result of marketers engaging in conduct that Congress intended to address when enacting the TCPA. But faced with the burden of proving consent, the cost of litigation, and the chance that a court could order catastrophic damages in the event the company loses, some defendant companies settle for large sums.[22]

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[18] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072-8073 (2015) ("2015 TCPA Order").

[19] *Id*. at 8073.

[20] *Id*.

[21] *See, e.g.*, *Zente v. Credit Mgmt., L.P.*, 789 F.3d 601 (5th Cir. 2015) (declining to review a district court's decision to refer plaintiff's counsel to bar authorities for allegedly knowingly filing a TCPA complaint in federal court based on fabricated evidence); *Phan v. Convergent Outsourcing, Inc*., No. 3:14-cv-84-J-25 JBT, 2015 WL 12856781, at *5 (M.D. Fla. Mar. 27, 2015) (granting Rule 11 sanctions where plaintiff manufactured screen shots purportedly showing calls from the defendant—calls the defendant never made).

[22] U.S. Chamber Inst. for Legal Reform, *The Juggernaut of TCPA Litigation*, at 3 (Oct. 2013), http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

In the case of reassigned numbers specifically, companies have faced lawsuits for not removing disconnected numbers from their databases *despite* these companies having obtained and used the disconnection list from the carriers. Responsible marketers are doing the best they can do, but because there is no transparency and no process for parties like Vibes to evaluate the accuracy of the disconnection lists independently, Vibes has no choice but to rely exclusively on the carriers to ensure accuracy. Unsurprisingly then, exposing marketers to TCPA liability for any errors in disconnection lists has not resulted in any meaningful impact on the accuracy of these lists. Ultimately, the disconnection lists are not perfect, and technical or administrative error can occur during the scrubbing process.

The litigation arising from reassigned numbers claims increased after the Commission released the 2015 TCPA Order.[23] In that order, the Commission determined that the statutory term "called party" is the current subscriber rather than the intended recipient of a call, and, thus, a call or message to a consenting party's number that had been reassigned to another person amounted to a violation of the TCPA apart from a one-call, post-reassignment safe harbor for callers that lacked "knowledge of [the] reassignment" and possessed "a reasonable basis to believe that they have valid consent."[24] Many parties appealed the 2015 TCPA Order,[25] and the D.C. Circuit recently vacated as arbitrary and capricious the Commission's interpretation of "called party."[26] The court noted that the Commission "consistently adopted a 'reasonable

[23] 2015 TCPA Order, 30 FCC Rcd. 7961.

[24] 2015 TCPA Order, 30 FCC Rcd. at 8000.

[25] Vibes was one of the petitioners that challenged the FCC's 2015 TCPA Order.

[26] *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 707-709 (D.C. Cir. 2018).

reliance' approach when interpreting the TCPA's approval of calls based on 'prior express consent.'"[27]

In light of the D.C. Circuit's ruling, the Consumer and Governmental Affairs Bureau released a Public Notice seeking comment on how to treat calls to reassigned numbers, including how to interpret the term "called party" for calls to reassigned numbers and whether to maintain a reasonable-reliance approach" to prior express consent.[28] The notice also asks whether a reassigned numbers safe harbor is necessary, including in light of the current proceeding to establish a reassigned numbers database.

The Commission has the authority to adopt a limited safe harbor, shielding companies who adhere to FCC rules or adopt FCC-endorsed best practices for identifying disconnected numbers against TCPA claims based on the companies' alleged failure to identify a reassigned number. For example, the Commission put in place a limited-duration safe harbor, which prevents companies from being held liable for calls placed to a wireless number without the requisite consent when the number at issue has been recently ported from a landline. The FCC determined that "absent a limited safe harbor" for ported numbers, "telemarketers simply cannot comply with the statute."[29] Here too, absent a limited safe harbor for calls companies make to reassigned numbers that fall through the cracks—*i.e.*, that Commission-mandated or industry-recommended methods fail to identify as reassigned—companies that use autodialing technology

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[27] *Id.* at 707.

[28] *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, Public Notice, DA No. 18-493, CG Docket Nos. 18-152, 02-278, at 3-4 (rel. May 14, 2018).

[29] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd. 19215, 19218-19219 (2004).

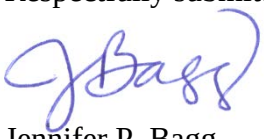
or prerecorded messages to contact wireless customers could face claims that they violated the TCPA. Even if the Commission confirms that the called party is the intended recipient, and clarifies that a party cannot be held liable if it reasonably relied on consent it received from a former subscriber of a number, the safe harbor will provide one possible mechanism for callers to demonstrate they acted reasonably. Moreover, a safe harbor will encourage callers to utilize the database, which will provide further consumer benefits.

The safe harbor need not be permanent. Should the Commission conclude that a recipient of a call or text is not calling a "called party" when the caller dials a number for which the caller has consent, but the number has been transferred to a new user, then the safe harbor arguably is no longer necessary. Callers would not need the safe harbor because they would not be liable for a TCPA violation under those circumstances. In any event, the Commission must be crystal clear about the compliance obligations that do apply to callers so that callers can avoid unnecessary litigation brought by unscrupulous plaintiffs or, at a minimum, quickly and easily defend such litigation.

VI. CONCLUSION

Vibes looks forward to working with the Commission to develop a reassigned numbers solution, whether through modifications to the existing industry-developed solution or the development of a database. Should the FCC proceed with the database route, Vibes encourages the FCC to adopt the modifications to the existing solution in the interim, which will provide immediate benefits to consumers and the industry.

Respectfully submitted,



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